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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1122

ESTATE OF JOSEF BEN DECKER or JOS. B. DECKER, Deceased.

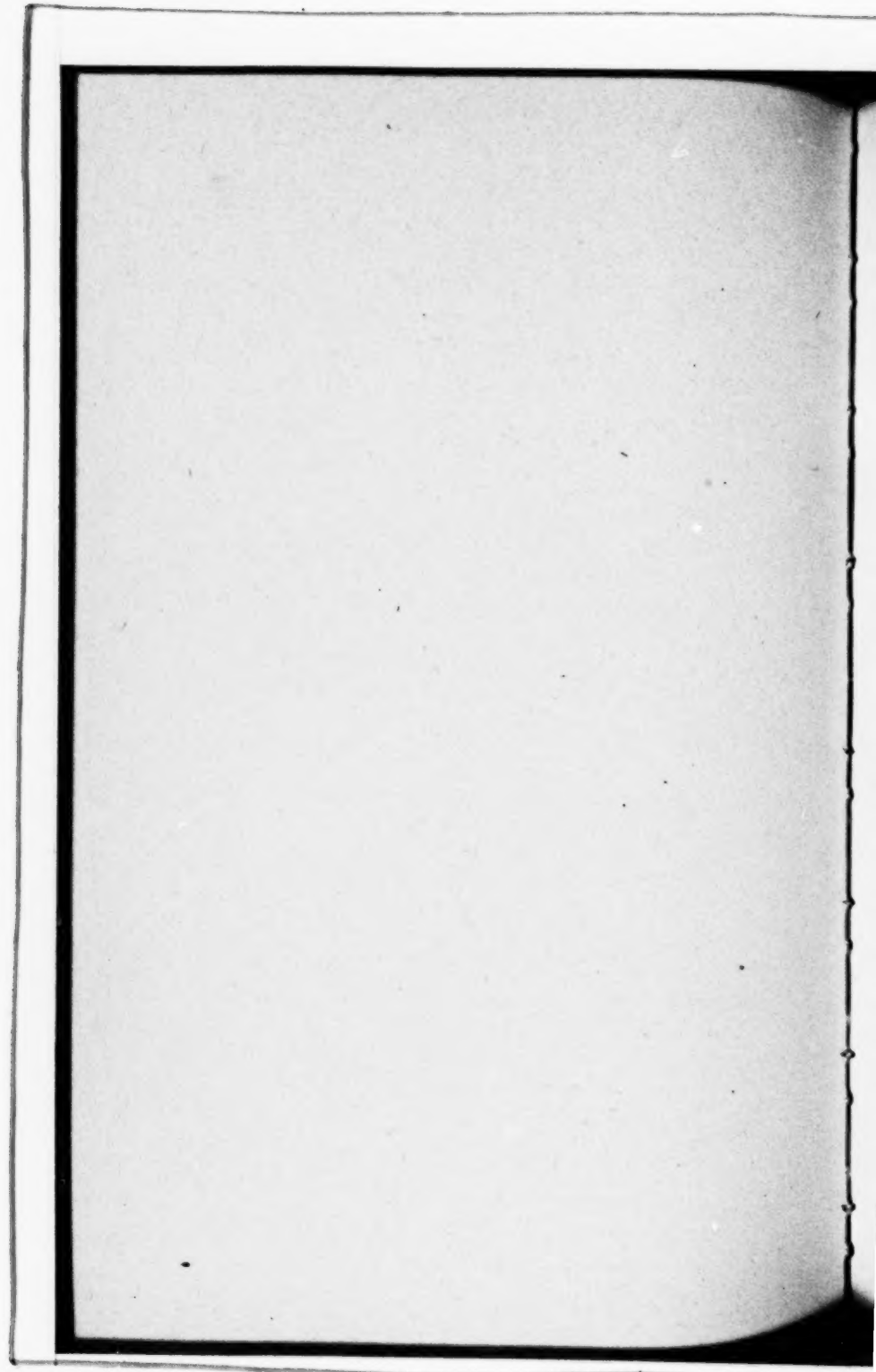
APPEAL OF GERTRUDE M. DECKER, ET AL., *Executors*,
and of GERTRUDE M. DECKER, Individually, *Petitioners*.

Petition For Writ of Certiorari to the Supreme Court of
Pennsylvania, Western District.

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Pennsylvania, Western District.

PETITION.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania, Western District entered on November 25, 1946 (R. 95), and the Court's order (R. 109) and opinion (R. 110) entered on January 6, 1947 (R. 109, 110) denying the petitioners' petition for reargument.

JURISDICTION.

Jurisdiction is conferred upon the Supreme Court to review this cause by writ of certiorari by Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A. Title 28, Section 344).

STATEMENT.

The facts, found with substantial accuracy by the trial court (R. 65a-75a) and the issues are briefly these:

The domiciliary estate in Maryland is insolvent (R. 84a) and the Executors thereof petitioned the Orphans' Court of Allegheny County, Pennsylvania, (R. 62a) to remit the assets of an ancillary administration to the domiciliary estate in order that the debts due the United States for estate and income taxes could be paid. The Supreme Court of Pennsylvania (R. 102) affirmed the Orphans' Court in holding that certain Pennsylvania creditors hereinafter referred to as the Kanns had a perfected secured lien that gave them a preference over the United States. We believe such holding to be contrary to the decisions of this Court—therefore this application for a writ of certiorari.

Two transactions are involved, the parties in each being the same; i. e., the decedent Decker and the two Kanns of Pittsburgh.

Decker, in 1937, was an employee of a corporation and purchased from the Kanns some of the said corporation's capital stock, under an agreement that provided such stock was to be paid for only out of dividends (R. 37a); the Kanns holding the stock as security (R. 37a).

Later, in 1941, Decker, the Kanns and others purchased additional stock in the same corporation with monies borrowed by the Kanns from the People-Pittsburgh Trust Company (R. 42a). The agreement covering this purchase (R. 41a) provided, *inter-alia*, that the stock so purchased was to be delivered to the Kanns for the purpose of depositing it as additional security with the lending bank (R. 42a)—they did not so deposit it (R. 72a); and that the signatories to the agreement would save the Kanns harmless on the said loan (R. 45a). The Kanns paid the loan off on November 12, 1943 (R. 72a).

On October 31, 1942, Decker authorized the Kanns to deposit the stock with the Peoples-Pittsburgh Trust Co. as voting trustees (R. 73a).

The stock was deposited in 1942 (R. 73a); and on July 20, 1943, the voting trustee issued—but did not deliver—voting trust certificates in the name of Decker (R. 74a).

Decker died on April 5, 1944 (R. 65a). On that date—and until sometime after June 21, 1944 (R. 74a) the unendorsed voting trust certificates, in the name of Decker, remained undelivered in the hands of the voting trustee (R. 74a).

Thereafter, on November 10, 1944 (R. 1a) the Kanns (R. 2a-4a) applied to the Register of Wills of Allegheny County, Pennsylvania, for letters of ancillary administration (R. 5a); and the Register appointed the Union Trust Company of Pittsburgh (R. 5a) as ancillary administrator.

The ancillary administrator took possession of and endorsed the voting trust certificates (R. 55a, 58a); and then sold them (R. 75a); so that the cash proceeds of sale became the subject matter of the ancillary administration.

The Court held that the Kanns originally obtained, and never subsequently lost the rights of pledgees of the stock received from Decker under the agreements both of 1937 and 1941, and that those rights were continued in the voting trust certificates (R. 101).

The Court then concludes that the priority created by Revised Statutes 3466 (Title 31, U. S. C. A., Section 191) is restricted by Section 3672(b)(1) (Title 26, U. S. C. A.) invalidating such priority as to pledgees (R. 101); and that the lien created by Section 827, (U. S. C. A., Title 26) is likewise invalid with respect to pledgees by the express provision of Section 3672(b)(1), (U. S. C. A., Title 26) (R. 102). In denying the motion for reargument the Court concluded that Section 827, standing alone, does not create a priority for the United States over pre-existing mortgages or pledges the liens of which had attached during decedent's lifetime (R. 111); without distinguishing an imperfect lien from a perfected one. Hence from the petitioners' viewpoint, these are the

QUESTIONS PRESENTED.

1. Is the lien imposed on the voting trust certificates by the decisions below an imperfect or a specific and perfected lien?

2. If it is a perfected specific lien, do the Kanns have a priority of payment despite R. S. 3466 granting the United States a priority for debts due the United States or Section 827 I. R. C. creating an estate tax lien?

3. If the liens were not specific and perfected liens, does the United States have priority within the purview of R. S. 3466 and Section 827, I. R. C.?

4. Do the agreements between the decedent and the Kanns preserve to the Kanns any lien or pledge at all?

REASON FOR GRANTING THE WRIT.

The decision below is in flat, open conflict with a principle repeatedly enunciated in decisions of this Court and other authorities. This is the principle that a lien—*inter alia*, one requiring the aid of a court to perfect it—is not sufficient to defeat the priority of the United States in order of payment under Revised Statutes, Section 3466. *New York v. Maclay* (288 U. S. 290); *U. S. v. Texas* (314 U. S. 480); *U. S. v. Waddill, Holland & Flinn* (323 U. S. 353); *Underwood v. U. S.* (5 C. C. A.) (118 Fed. 2d. 760); *People of Illinois v. Campbell* (328 U. S. . . , 67 S. Ct. 340).

In this case, if there was a lien at all—and here a state court's characterization of a lien is not conclusive (*U. S. v. Waddill, Holland & Flinn* (323 U. S. 353, 357); *People of Illinois v. Campbell* (328 U. S. . . , 67 S. Ct. 340, 340))—the voting trust certificates were *not*, on the date of death, in the possession of the lien-holder; nor were the certificates endorsed and in transferable form. The claimants had to invoke the jurisdiction of the courts of Pennsylvania by

applying for an ancillary administration (R. 2a) in order to place the certificates in salable form (R. 55a, 58a).

The decision below decides two federal questions of substance not heretofore determined by this Court by holding that Section 3672(b) of the I. R. C. modifies R. S. 3466 so that the latter is not applicable to pledgees and that Section 827 of the I. R. C., which creates an estate tax lien, grants no priority to the United States over pre-existing mortgages and pledges.

The decision below, unless corrected by this Court, will cause endless confusion on a question of federal law, and, calls for an exercise of this Court's power of supervision. It is, therefore, respectfully submitted that the petition should be granted.

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Of Counsel:

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March, 1947.

Supreme Court of the United States

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No.

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APPEAL OF GERTRUDE M. DECKER, ET AL., *Executors*,
and of GERTRUDE M. DECKER, Individually, *Petitioners*.

Petition For Writ of Certiorari to the Supreme Court of
Pennsylvania, Western District.

BRIEF IN SUPPORT OF PETITION.

OPINION BELOW.

The opinion of the Supreme Court of Pennsylvania (R. 95) is reported in 49 A 2d 714; and, the opinion denying the motion for reargument (R. 110) has not been reported.

JURISDICTION.

The judgment of the Supreme Court of Pennsylvania was entered November 25, 1946 (R. 95), and its opinion denying the petitioners' motion for reargument was entered January 6, 1947 (R. 109). Jurisdiction is conferred on this Court by Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. A., Title 28, Section 344).

STATEMENT.

The essential facts are stated in the foregoing petition, pp. 2-3.

QUESTIONS PRESENTED.

The questions presented are stated in the foregoing petition, p. 4.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Pennsylvania erred:

1. In holding that the Kanns did not default on their agreement of July 10, 1937.

2. In failing to hold that the Kanns did abandon all their rights under the agreement of July 10, 1937 as provided in paragraph 12 thereof by failure to avail of the provisions contained in paragraphs 9 or 10 of the said agreement; and that accordingly the voting trust certificate for 6,000 shares of stock was not the subject of a pledge or lien.

3. In holding that the Kanns were entitled to retain the 7,166 shares of stock as security until Decker discharged his obligation to them represented by the note of \$21,498.

4. In failing to hold that the delivery of the stock to the Kanns for a specific purpose—that is, the pledging of such stock as additional security with the bank for a loan—did not entitle the Kanns to hold such stock as security for the debt due them.

5. In holding that the Kanns originally obtained, and never subsequently lost, the rights of pledgees of the stock received from Decker under the agreements both of 1937 and 1941, and that those rights were continued in the voting trust certificates.

6. In failing to hold—after concluding that the Kanns could, of course, have compelled Decker, by proceeding

in equity, to endorse the certificates over to them—that the lien, if there was one at all, was an imperfect lien and required the aid of a court to perfect it.

7. In holding that the paramountcy of the Kanns' rights as pledgees is established by Section 3672(b)(1) (U. S. C. A. Title 26).

8. In holding that Section 827 (U. S. C. A., Title 26) does not create a lien in favor of the United States that is superior to the lien of the Kanns.

9. In failing to hold that the claims of the United States for estate and income taxes are entitled to priority in payment over the claims of the Kanns.

SUMMARY OF ARGUMENT.

The estate is insolvent (R. 84a) and is indebted to the United States for estate taxes (R. 83a). There are also income taxes due from the decedent (R. 83a). The priority of the United States to payment has been denied by the Pennsylvania Supreme Court in an ancillary proceeding on the grounds that the claims of the Kanns were secured on the date of death and for that reason they were entitled to payment before the United States, without distinguishing between a perfected lien and an imperfect one.

We contend that the Kanns had no lien at all; or at best, only an imperfect lien. However, if this Court should hold that the Kanns did have a perfected lien, then, in that event, the United States is still entitled to priority of payment.

The priority of the United States in case of a perfected lien has not been decided by this Court because, in each case, the Court was able to find that only an imperfect lien existed; and, that an imperfect lien is not sufficient to deprive the United States of its priority of payment.

ARGUMENT.**I.**

The debts due the United States shall be first satisfied in the case of an estate that is insolvent.

The estate is insolvent (R. 84a) and there are debts owing to the United States (R. 14a). Revised Statutes Section 3466 (Sec. 191, Title 31, U. S. C. A.), set forth in the Appendix, provides that in the case of insolvent estates the debts due to the United States shall be first satisfied.

This Court has had before it a number of cases wherein it was claimed that the above statute has no application in case of a pre-existing perfected lien. The Court has not found it necessary to resolve the question because in each case it was able to conclude that the purported lien was an imperfect one, and therefore did not disturb the priority of the United States. *U. S. v. Waddill, Holland & Flinn* (323 U. S. 353); *U. S. v. Texas* (314 U. S. 480); *People of State of N. Y. v. Maclay* (288 U. S. 290); *People of Illinois v. Campbell* (328 U. S. . . , 67 S. Ct. 340).

Here, too, this Court should hold the lien to be an imperfect one, because this Court decides the status of the lien and is not bound by what the state court finds the status of the lien to be. *U. S. v. Waddill, Holland & Flinn (supra)*; *U. S. v. Texas (supra)*; *U. S. v. Knott* (298 U. S. 544). The lien on, or pledge of, the voting trust certificates, which were undelivered by the voting trustee on the date of death, which had been issued in the name of the decedent and unendorsed, leaves much to be desired to create a perfected lien. In the case at bar, the state court did not hold the lien to be a perfected one—it simply did not characterize it, although it did say that the Kamns could have compelled the decedent by a proceeding in equity to endorse the certificates (R. 100, 101). The need of invoking the aid of a court to perfect the lien establishes the lien as an imperfect one; and, as such it does not affect the priority of the United States.

It therefore becomes unnecessary to decide the effect of a perfected lien, in order to determine the priority of the United States. That priority is unimpaired.

Furthermore, we submit that the point of demarcation under Revised Statutes, Section 3466 is title in the executor or administrator. In cases of pledges or liens, as here, title remains in the pledgor or lienor, and passes unimpaired to the executor or administrator. At this point the priority of the United States is apparent and paramount, and debts due the United States shall be first paid.

II.

The priority created by Revised Statutes 3466 (Title 31, U. S. C. A., Sec. 191) is not invalidated by Section 3672 (Title 26, U. S. C. A.).

The decision below (R. 101) holds that Section 3672(b)(1) invalidates any lien created by Section 3466 R. S. (Both statutes are set forth in the appendix). By so holding, it confuses two separate and distinct matters—Section 3466 R. S. does not create a lien, it creates a priority in payment; whereas Section 3672(b)(1) by its express terms relates to the lien created by Section 3670 (formerly Section 3186 R. S.), and excludes securities in the hands of a pledge without notice of the lien.

This Court in *Detroit Bank v. U. S.* (317 U. S. 329) held that Sections 3670-3672 and Section 827 (then Section 315(a)) of the Internal Revenue Code, are intended each to operate independently of the other, and in reaching that conclusion analyzed the history of the legislation. If Sections 3670-3672 and 827—both of which create liens and are in the same title of the code—are separate and distinct and operate independently; a fortiori R. S. 3466 (Section 191 of Title 31, U. S. C. A.)—appearing in an entirely different title and creating a priority instead of a lien, must operate independently and not be affected by any provision of Section 3672.

It is clear from the Congressional Committee Reports (CB 1939-2 pp. 523-4, 531) that Section 3672(b) did not extend the scope of Section 3672 to other statutes—it remained confined to the lien created under Section 3670. The amendment only excepted securities from requirement of notice—nothing more, and was occasioned by the decision of a District Court in Michigan, *U. S. v. Rosenfield* (26 F. Supp. 433).

It is also significant to note that the sections following Section 3670 (Title 26, U. S. C. A.) all are in derogation of the lien there created; 3671 limits the duration; 3672(a) requires notice; 3672(b) exempts pledges, etc.; 3673 relates to releases; 3674 to partial discharge; 3675 relates to satisfaction; and 3676 is administrative. Then Section 3677 provides that Sections 3673, 3674, 3675 and 3676 apply to any Internal Revenue tax protected by lien. If 3672(b) (pledges) was intended to apply to Revised Statutes 3466 or Section 827 of Title 26, it would have been very easy for Congress to say so by adding Section 3672(b) to the list of sections included in Section 3677—but it did not do so.

There is no foundation for the court below to hold that Section 3672(b) affected Section 3466 R. S.

III.

The lien for the estate tax created by Section 827 (Title 26, U. S. C. A.) is separate and distinct from the lien created by revised statutes 3186 (Sections 3670-3672, Title 26, U. S. C. A.).

The Court below in its opinion denying the motion for reargument holds that the lien created by Section 827 (Title 26, U. S. C. A.) does not take priority over pre-existing pledges, the liens of which had attached during decedent's lifetime (R. 111)—even though such statute be viewed as wholly unimpaired by Section 3672(b)(1) (R. 110).

In so holding, the Court does not distinguish between an imperfect and perfected lien; and, reads into the statute an exception not stated there. This Court has not passed upon

the effect on Section 827 (Title 26, U. S. C. A.) of a perfected lien attaching prior to death. In such cases as have come before the Court the purported lien did not attach earlier. (*State of Michigan v. U. S.* (317 U. S. 388); *Detroit Bank v. U. S.* (317 U. S. 338)). Here it is not necessary to pass upon Section 827 as affected by a perfected lien because the liens—if they existed at all—were imperfect liens requiring the aid of a Court to perfect them. However, should this Court hold that the liens in question were perfected liens, then the question of priority must be determined due to the importance of the question to the administration of the revenue laws.

IV.

The liens—if there were any at all—were not perfected liens.

The voting trust certificates, on the date of death were in the hands of the voting trustee, made out in the name of the decedent, and not endorsed by him (R. 52a to 59a). The certificates are dated July 20, 1943 (R. 54a, 58a) and bear only the endorsement of the ancillary administrator dated November 15, 1944 (R. 55a, 58a). The decedent died on April 5, 1944 (R. 65a). So that the facts are that the certificates were made out nine months before his death, they were unendorsed on the date of his death (R. 100, 101), and they were not delivered to the Kanns until sometime after June 21, 1944 (R. 98) which is a minimum period of ten weeks after his death. The Kanns had not had physical possession since October 1942 (R. 100), a period of twenty months.

If an equitable lien existed; then, as the Court below states (R. 100, 101):

“if Decker had been then alive, the Kanns could, of course, have compelled him, by proceeding in equity, to endorse the certificates over to them had he refused voluntarily to put the voting trust certificates in the same negotiable form as that of the stock certificates for which they had been exchanged”.

We agree with that conclusion if an equitable lien existed; but an equitable lien is not a perfected lien. No authority is needed for such a fundamental concept. Here, the Kanns petitioned the Court for the appointment of an ancillary administrator (R. 2a-5a). The ancillary administrator procured possession and endorsed the certificates (R. 55a, 58a) and then sold them (R. 9a). The cash so realized on the sale by the ancillary administrator is the fund the Court below holds is impressed with a prior lien in favor of the Kanns to the detriment of the United States.

This Court has consistently held that an imperfect lien is not sufficient to defeat the priority of the United States. In *New York v. Maclay* (288 U. S. 293), this Court held a lien of New York State was not a perfected lien, but merely a caveat of a more perfect lien to come, and held for the United States. In *U. S. v. Texas* (314 U. S. 480), this Court again found an imperfect lien and held for the United States; the opinion stating in part (p. 488), "it could not be enforced without the assistance of the courts". *U. S. v. Waddill, Holland & Flinn* (323 U. S. 353) is to the same effect; and more recently in *People of Illinois v. Campbell* (328 U. S. ..., 67 S. Ct. 340) this Court again found an imperfect lien and decided for the United States.

If the Kanns had had a perfected lien, they would not have applied to a court for an ancillary administration—they would have sold the collateral and remitted the balance, if any, after taking care of the indebtedness.

V.

Is there a lien at all—imperfect or perfect?

If this Court was to hold that the facts surrounding the voting trust certificates on the date of death did prima facie reflect a lien of a sufficient degree of perfection to defeat the priority in payment of the United States; then it becomes necessary to determine whether in fact liens existed at all.

For this purpose we must examine the two agreements; that is the agreement of July 10, 1937 (R. 36a-40a) and the agreement of December 12, 1941 (R. 41a-47a).

1937 agreement.

(Exh. A—R. 36a-40a)

This agreement involves the sale of stock to an employee, Decker, by a stockholder of the employer corporation. Paragraph 3 provides that the

“purchase price shall be payable only out of such dividends as may be declared on the said stock, and the Buyer shall be under no obligation whatsoever to pay said purchase price, except in the manner herein provided.”

Apparently this was a satisfactory arrangement while the employee continued in the employ. However, the contingency of discharge, resignation or death had to be taken into account should any of these events happen before the agreed purchase price had been paid.

Very wisely the sellers allowed themselves several alternatives; an option to repurchase (par. 9) (R. 38a); an obligation to repurchase in case of death (par. 10) (R. 38a); and a means of determining the price under paragraphs 9 or 10 par. 11) (R. 39a).

The option in paragraph 9 provided a ninety-day period (R. 38a) and the obligation in paragraph 10 provided a period of six months after death (R. 38a-39a).

Here the decedent died on April 5, 1944 and the latest contract date for action was six months, or October 4, 1944. The Kanns permitted that period to expire—probably hoping the executors would remain in ignorance of their rights—and only then applied for an ancillary administration. Paragraph 12 of that agreement (R. 39a-40a) provides that Decker could not sell unless the Kanns defaulted. They did default by not exercising their rights, and we maintain that under the plain and unambiguous

reading of the agreement all rights to the stock or proceeds were abandoned.

Upon abandonment they had no rights—either as creditors or pledgees.

1941 agreement.

(Exh. B—R. 41a-47a)

This agreement involves the purchase of stock by a group including the Kanns and Decker. The Kanns agreed to borrow the money to finance the purchase (R. 42a) and the borrower required the stock so purchased to be deposited as additional collateral (R. 42-a). The stock was *not* so deposited (R. 72a) and the loan was repaid on November 12, 1943 (R. 72a).

The agreement is clear and makes no provision for the stock to be held by the Kanns as collateral on the debt due them. The promissory note given by Decker (R. 49a) makes no reference to collateral. The stock, at no time, was placed with the Kanns as collateral to any debt due them. They had no lien.

VI.

Conclusion.

In conclusion, the decision below is in flat conflict with a principle repeatedly enunciated in decisions of this Court—that an imperfect lien will not defeat the priority of the United States—and decides two federal questions not heretofore determined by this Court, by holding that Section 3672(b) modifies R. S. 3466; and, that Section 827 I. R. C. creates no priority over pre-existing mortgages and pledges without distinguishing between perfected and imperfect pledges.

It is, therefore, respectfully submitted that the petition should be granted.

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March, 1947.

APPENDIX.

REVISED STATUTES, Section 3466 (Section 191, Title 31, United States Code Annotated) provides:

"Priority established. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

SECTION 3670 (Title 26, United States Code Annotated) provides:

"Property subject to lien. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

SECTION 3671 (Title 26, United States Code Annotated) provides:

"Period of lien. Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time."

SECTION 3672 (Title 26, United States Code Annotated) provides:

"Validity against mortgagees, pledgees, purchasers, and judgment creditors.

(a) *Invalidity of lien without notice.* Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial laws.* In accordance with the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law provided for the filing or such notice; or

(2) *With clerk of district court.* In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law provided for the filing of such notice; or

(3) *With clerk of District Court of the United States for the District of Columbia.* In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

(b) (1) *Exception in case of securities.* Even though notice of a lien provided in Section 3670 has been filed in the manner prescribed in subsection (a) of this section, or notice of a lien provided in section 3186 of the Revised Statutes, as amended, has been filed in the manner prescribed in such section or subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser, of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

(2) *Definition of security.* As used in this subsection the term "security" means any bond, debenture, note, or certificate, or other evidence of indebtedness, issued by any corporation (including one issued by a government or political subdivision thereof), with interest coupons or in registered form, share of stock, voting trust certificate, or any certificate of interest or participation in, certificate of deposit or receipt for, tem-

porary or interim certificate for, or warrant or right to subscribe to or purchase, any of the foregoing; negotiable instrument; or money." * * *

SECTION 3673 (Title 26, United States Code Annotated) provides:

"Release of lien.

Subject to such regulations as the Commissioner, with the approval of the Secretary, may prescribe, the collector charged with an assessment in respect of any tax, may issue a certificate of release of the lien if—

(a) *Liability satisfied or unenforceable.* The collector finds that the liability for the amount assessed, together with all interest in respect thereof, has been satisfied or has become unenforceable by reason of lapse of time; or

(b) *Bond accepted.* There is furnished to the collector and accepted by him a bond that is conditioned upon the payment of the amount assessed, together with all interest in respect thereof, within the time prescribed by law (including any extension of such time), and that is in accordance with such requirements relating to terms, conditions, and form of the bond and sureties thereon, as may be specified in the regulations."

SECTION 3674 (Title 26, United States Code Annotated) provides:

"Partial discharge of property.

(a) *Property double the amount of the liability.* Subject to such regulations as the Commissioner, with the approval of the Secretary, may prescribe, the collector charged with an assessment in respect of any tax may issue a certificate of partial discharge of any part of the property subject to the lien if the collector finds that the fair market value of that part of such property remaining subject to the lien is at least double the amount of the liability remaining unsatisfied in respect of such tax and the amount of all prior liens upon such property."

(b) *Part payment.* Subject to such regulations as the Commissioner, with the approval of the Secretary, may prescribe, the collector charged with an assessment in respect of any tax may issue a certificate of discharge of any part of the property subject to the lien if there is paid over to the collector in part satisfaction of the liability in respect of such tax an amount determined by the Commissioner, which shall not be less than the value, as determined by him, of the interest of the United States in the part to be so discharged. In determining such value the Commissioner shall give consideration to the fair market value of the part to be so discharged and to such liens thereon as have priority to the lien of the United States.

SECTION 3675 (Title 26, United States Code Annotated) provides:

"Effect of certificates of release or partial discharge.

A certificate of release or of partial discharge issued under this subchapter shall be held conclusive that the lien upon the property covered by the certificate is extinguished."

SECTION 3676 (Title 26, United States Code Annotated) provides:

"Single bond covering release of lien and payment of income tax deficiency.

The Commissioner, with the approval of the Secretary, may by regulation provide for the acceptance of a single bond complying both with the requirements of section 272 (j) (relating to the extension of time for the payment of a deficiency) and the requirements of subsection (b) of section 3673."

SECTION 3677 (Title 26, United States Code Annotated) provides:

"Extended application of provisions relating to release or partial discharge.

Sections 3673, 3674, 3675, and 3676 shall apply to a lien in respect of any internal revenue tax, whether or not the lien is imposed by this subchapter."

SECTION 827 (Title 26, United States Code Annotated) provides:

“Lien for tax.

(a) *Upon gross estate.* Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

(b) *Liability of transferee, etc.* If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in section 827 (a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

(c) *Continuance after discharge of executor.* The provisions of section 825 shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due,

unless the title to such part of the gross estate has passed to a bona fide purchaser for value, in which case such part shall not be subject to a lien or to any claim or demand for any such deficiency, but the lien shall attach to the consideration received from such purchaser by the heirs, legatees, devisees, or distributees."

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CHARLES ELMORE CRISLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1122.

ESTATE OF JOSEF BEN DECKER OF JOS. B. DECKER, Deceased.

APPEAL OF GERTRUDE M. DECKER, et al., *Executors*, and of
GERTRUDE M. DECKER, *Individually, Petitioners*,

v.

G. H. KANN and W. L. KANN, *Respondents*.

On Petition for Writ of Certiorari to the Supreme Court of
Pennsylvania, Western District.

REPLY BRIEF FOR PETITIONERS.

✓
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Counsel for Petitioners.

Of Counsel: ✓

R. PALMER INGRAM,
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On Petition for Writ of Certiorari to the Supreme Court of
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REPLY BRIEF FOR PETITIONERS.

The respondent in its brief challenges the jurisdiction of this Court on the grounds that the petitioners have no title, right, privilege or immunity which is personal to themselves and in which they have no interest.

Assuming, arguendo, that the respondents are correct in their conception of the jurisdictional requirements, we submit that the petitioners as executors, and the petitioner, Gertrude M. Decker as an individual, do have the necessary direct interest.

Section 3670 (Title 26, U. S. C. A.) (set forth in the appendix of the petition) imposes a personal liability on the executors for the payment of the taxes at issue; Gertrude M. Decker individually was a party to the appeal before the Supreme Court of Pennsylvania (R. 89)—she does not come before this Court as an individual in an effort to bring herself within the issues raised by her in her capacity as executrix—she personally was a party to the appeal and raised the issues now presented (R. 95). It will be noted that Section 192 (31 U. S. C. A.) provides:

“Liability of fiduciaries. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.” (R. S. 3467).

so that the executors and Gertrude M. Decker have a very direct interest in the question being correctly decided.

Respectfully submitted,

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April, 1947.

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CHARLES ELMORE GOSLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1946

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ESTATE OF JOSEF BEN DECKER or JOS. B.
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APPEAL OF GERTRUDE M. DECKER, et al., Execu-
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Individually, Petitioners.

BRIEF FOR RESPONDENTS IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA,
WESTERN DISTRICT.

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1919	Robert Brown, 789 Elm St., Boston, Mass., 28, M, Student	3
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1921	William Black, 234 Cedar St., St. Louis, Mo., 55, M, Merchant	5
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Supreme Court of the United States

OCTOBER TERM, 1946

NO. 1122.

**ESTATE OF JOSEF BEN DECKER or JOS. B.
DECKER, Deceased.**

**APPEAL OF GERTRUDE M. DECKER, et al., Execu-
tors, and of GERTRUDE M. DECKER,
Individually, Petitioners.**

**BRIEF FOR RESPONDENTS IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA,
WESTERN DISTRICT.**

OPINION BELOW.

The Opinion of the Supreme Court of Pennsylvania (R. 95) is reported in 355 Pa. 331; 49A 2d 714; and the Opinion denying the motion for reargument (R. 10) is reported in 355 Pa. 476.

JURISDICTION.

Petitioners, in their Petition for Writ of Certiorari (p. 1), and in their Brief in Support of Petition (p. 7), claim that jurisdiction is conferred on this Court by Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (*U. S. C. A., Title 28, Section 344*).

Respondents contend that this case does not fall within Section 237 (b) of the Judicial Code and that the Supreme Court of the United States is without jurisdiction under said section of the Judicial Code, since there is no title, right, privilege or immunity under the Constitution, or any treaty or statute of the United States *personal* to petitioners which has been specially set up or claimed by either party.

STATEMENT.

The following is deemed necessary in order to correct certain inaccuracies and omissions in the Statement of petitioners:

Since reference is frequently made to R. 68 a to 75 a, it is important to note that said pages of the Record contain the facts as found by the trial court, which facts were stipulated by the parties hereto to be the facts in this case (R. 16 a). This Stipulation was entered into in lieu of the testimony taken before the Auditing Judge (R. 16 a).

Claim against the Estate of Josef Ben Decker, Deceased, for outstanding assessments of income and estate taxes was made by the United States Tax Col-

lector before the Auditing Judge of the Orphans' Court of Allegheny County (R. 13 a). In the Statement of Claim for Taxes Due the United States, filed in the Orphans' Court of Allegheny County, Pennsylvania, by the United States Tax Collector, priority of the United States was claimed for the payment of taxes under *Section 3466 of the Revised Statutes* (Title 31, U. S. C. A., Section 191)* (R. 15 a). The United States Government did not pursue its claim of priority beyond the Orphans' Court of Allegheny County, Pennsylvania, was not a party to the Appeal to the Supreme Court of Pennsylvania and is not a party to this Petition for Writ of Certiorari.

Under the 1937 Agreement, certificates for the stock sold to Decker by the Kanns were endorsed by Decker and thereafter held by the Kanns as collateral security for the payment of the purchase price with interest (R. 69 a). Decker also executed an order to the company whose stock was involved directing it to pay to the Kanns all dividends which might be declared on said stock until said purchase price has been fully paid with interest. When said purchase price was paid in full, the certificates representing said shares were to be surrendered to the buyer (R. 69 a).

Under the 1941 Agreement the Kanns had negotiated a loan with the Peoples-Pittsburgh Trust Company in order that Decker, the Kanns and others might purchase certain stock (R. 70 a). The loan was to be secured by collateral satisfactory to said bank, which collateral was furnished by the said Messrs. Kann (R. 70 a and 71 a).

* Hereinafter designated R. S.

Pursuant to the 1941 Agreement, Decker delivered to the Kanns, on or about December 19, 1941, certificates for the stock purchased for him, so endorsed by Decker as to be transferable (R. 72 a).

In said 1941 Agreement, Decker contracted to indemnify and save the Kanns harmless from every liability under the loan transaction to the extent of his participation in the total indebtedness, and until he paid his share of the loan, whether directly to the Trust Company or to reimburse the Kanns, he was not entitled to a return of the stock certificates (R. 43 a, 45 a and 46 a).

Decker confirmed the fact that the Kanns were entitled to retain the stock as security under the 1941 Agreement by his letter dated October 31, 1942 (R. 73 a). In said letter Decker acknowledged that the Kanns were still holding said stock; Decker knew that the stock had not been deposited with the Trust Company as collateral for the general loan which had been negotiated in 1941; and he authorized the Kanns to deposit said stock with the voting trustee and to accept from such voting trustee, in place and stead of such stock, voting trust certificates, which the Kanns were to hold in lieu of the stock under the terms of the 1941 Agreement (R. 73 a).

At the time that the stock certificates were delivered by the Kanns to the voting trustee, there were exhibited to the trustee the Agreements of 1937 and 1941, and likewise the letter to the Kanns signed by Decker, the decedent, dated October 31, 1942 (R. 73 a).

The voting trust certificates were not delivered to the Kanns by the voting trustee in lieu of the stock deposited with it until some time after June 21, 1944, be-

cause of a writ of foreign attachment by Triumph Explosives, Inc. against Decker, in which action the voting trustee was summoned as garnishee (R. 74 a).

Petitioners, in their Statement (Petition for Writ of Certiorari, p. 3), state that the ancillary administrator took possession of and endorsed the voting trust certificates and then sold them so that the cash proceeds of sale became the subject matter of the ancillary administration. Petitioners did not state, however, that the Kanns delivered the voting trust certificates to the ancillary administrator pursuant to a written agreement entered into between the ancillary administrator and the Kanns on November 14, 1944. Furthermore, said agreement provided, *inter alia*, that the proceeds of sale of the voting trust certificates, which were to be turned over to the ancillary administrator by the Kanns should be held by the ancillary administrator subject to all the rights and claims which the Kanns had under the 1937 and 1941 Agreements (R. 75 a). The agreement with the ancillary administrator also provided that the administrator should hold the proceeds of sale of the voting trust certificates until the rights of the Kanns as claimants were adjudicated (R. 75 a).

The proceeds of said sale were embraced by the Account before the Orphans' Court of Allegheny County, Pennsylvania, for audit (R. 75 a). The Supreme Court of Pennsylvania, in affirming the said Orphans' Court, held that the Kanns had a perfected secured lien as pledgees of the stock received from Decker under the Agreements both of 1937 and 1941, and that said perfected secured lien was never lost by them (R. 101). Though petitioners state that the Supreme Court of Pennsylvania did not distinguish an imperfect lien from

a perfected one (Petition for Writ of Certiorari, bottom of p. 3), they admit that the Supreme Court of Pennsylvania found that the Kanns *had* a perfected secured lien that gave them a preference over the United States (Petition for Writ of Certiorari, p. 2).

SUMMARY OF ARGUMENT.

I. Respondents contend that this case does not come within Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (U.S.C.A., Title 28, Section 344) and that, therefore, the Supreme Court of the United States is without jurisdiction. The title, right, privilege or immunity under the United States statute presented in this case by petitioners is the title, right, privilege or immunity of the United States Government, and not of the petitioners. The priority claimed by the petitioners is not for themselves, but for a third party, the United States Government, and petitioners do not even assert any claim for themselves thereunder. Therefore, the petition should be denied for want of jurisdiction.

II. The Kanns had a perfected secured lien as pledgees.

III. The priority conferred upon debts of the United States under R. S. 3466 was not intended to be superior to the rights of prior perfected secured liens. To hold otherwise would rock the financial structure of the nation by making loans to individuals such a risk that they would no longer be acceptable inasmuch as the pledgee would lose the collateral if the pledgor died be-

fore paying the debt and left an estate insufficient to pay taxes or other debts due the Government.

IV. R. S. 3466 (Title 31, U.S.C.A., Section 191) must be construed with Section 3672 (b) (1) (Title 26, U.S.C.A.). The latter section provides that tax liens in favor of the United States shall not be valid with respect to a security as against any pledgee (among others), if at the time of the pledge, pledgee is without notice or knowledge of the existence of such lien.

V. The lien of estate taxes under Section 827 (Title 26, U. S. C. A.) dates only from the time of decedent's death and does not take priority over existing pledges the liens of which had attached during decedent's lifetime. Since the Kanns' liens attached during Decker's lifetime and existed before the date of his death, the United States is not entitled to priority of payment under Section 827.

ARGUMENT.**I.**

Section 237 (b) of the Judicial Code does not confer jurisdiction upon the Supreme Court of the United States in this case.

The petitioners, both in their Petition (p. 1) and in their Brief (p. 7), state that jurisdiction is conferred on this Court by Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925 (U.S.C.A., Title 28, Section 344).

The foregoing section of the Judicial Code provides, *inter alia*, that it shall be competent for the Supreme Court, by certiorari, to review and determine any cause wherein a final judgment has been rendered by the highest court of the State, where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States. In the instant case, the title, right, privilege or immunity was specially set up before the Orphans' Court of Allegheny County, Pennsylvania, by the Federal Government (R. 13 a, 14 a and 15 a); and, as so aptly put by the Supreme Court of Pennsylvania, (R. 95) is being championed by the petitioners. Obviously the executors and Gertrude M. Decker, as an individual, the petitioners, do not represent the United States Government nor do they claim that they do.

However, for the Supreme Court of the United States to have jurisdiction in such a case, the title, right, privilege or immunity must be claimed by the petitioners themselves, and not for a third person under whom they

do not even assert any claim. *Long, et al. v. Converse, et al.*, 91 U. S. 105. This principle is well established and has been enunciated by the Supreme Court of the United States in a long line of cases. This Court has invariably held that if the title set up by appellants is that of a third person, in which they have no interest, the petition must be denied for want of jurisdiction. *Miller v. Lancaster Bank*, 106 U. S. 542; *Giles v. Little*, 134 U. S. 645; *Ludeling v. Chaffe*, 143 U. S. 301; *Texas and Pacific Railway Co. v. Johnson*, 151 U. S. 81; *Conde v. York*, 168 U. S. 642; *Liberty Warehouse Co. v. Burley Tobacco Growers Cooperative Marketing Association*, 276 U. S. 71; 72 L. ed. 473; and *Wilder Tileston v. Abraham S. Ullman*, 318 U. S. 44; 87 L. ed. 603.

In the instant case petitioners have set up a title, right, privilege or immunity under a statute of the United States which is not personal to themselves, but only to the Federal Government, under whom petitioners are not claiming. In view of the foregoing principle of law, as established by the Supreme Court of the United States in the cases cited above, the Petition for Writ of Certiorari should be denied for want of jurisdiction.

II.

The pledge of stock created perfected secured liens and, therefore, the claims of the United States are not entitled to priority.

Petitioners contend that the liens—if there were any at all—were not perfected liens (Petitioner's Brief, p. 13), for the reason that the voting trust certificates on the date of the death of Decker were in the hands of the voting trustee made out in the name of the decedent and not endorsed by him. This contention is with-

out substance since the stock certificates which were originally endorsed and pledged by Decker to the Kanns were all turned over by the Kanns to the voting trustee to be exchanged for voting trust certificates pursuant to a letter from Decker authorizing their so doing. This letter (R. 48 a) is so clear and so important that we shall quote it in full.

"EXHIBIT C.

Elkton, Maryland,
October 31st, 1942.

Messrs. G. H. and W. L. Kann,
4839 Harrison Street,
Pittsburgh, Penna.

Dear Sirs:

This will authorize you to deposit with the Peoples-Pittsburgh Trust Company, as Voting Trustee under a certain agreement with the stockholders of Triumph Explosives, Inc., 13,166 shares of the capital stock of Triumph Explosives, Inc., 7,166 shares of which are held by you under the terms of agreement dated December 12, 1941 by and between G. H. Kann, W. L. Kann, A. Leo Weil, Jr., I. A. Diamondstone, and myself, and 6,000 shares of which are held by you under the terms of an agreement between G. H. Kann, W. L. Kann and myself dated July 10, 1937; *and to accept from such Voting Trustee in place and stead of such stock, Voting Trust Certificates, which you are to hold in lieu of the stock under the terms of the aforesaid agreements.* (Italics ours)

Very truly yours,

J. B. DECKER."

This was an irrevocable consent which, because of the Kanns' interest, could in no way be affected or impaired by Decker's subsequent death. In accordance with the above quoted letter from Decker to Kanns, the stock was surrendered by the Kanns to the voting trustee only for the purpose of conversion into voting trust certificates, and no alteration whatever in the rights of the parties was thereby contemplated or authorized. The Kanns still retained their security, even while the stock was in the hands of the voting trustee, because of the aforesaid letter from Decker, and further because the 1937 and 1941 Agreements as well as the letter from Decker to the Kanns authorizing the deposit were shown to the said trustee (R. 73 a).

The delay of the voting trustee in delivering the certificates to the Kanns until subsequent to Decker's death when Decker could no longer endorse the certificates could not affect the relationship between the Kanns and Decker nor the respective rights of the parties in the certificates. Moreover, this delay on the part of the voting trustee is explained by the writ of foreign attachment wherein the voting trustee was garnishee (R. 74 a).

Petitioners' allegation (Petitioners' Brief pp. 10 and 14) that if the Kanns had had a perfected lien they would not have had to apply to a court for an ancillary administration to effect a sale of the voting trust certificates is so specious that we question the need of answering it. The inference is that the appointment of the ancillary administrator was necessary to enable the Kanns to sell the voting trust certificates. Such is not a fact. If an ancillary administrator had not been appointed, the Kanns could have refused to have accepted

from the voting trustee the voting trust certificates in Decker's name and they could have insisted that the certificates be issued and delivered to them in their names. They then could have sold the certificates and have paid to the domiciliary administrator the amount received from the sale in excess of the debt due them.

The Kanns did not get delivery of the voting trust certificates until after decedent's death and, presumably, they never saw them until then. When the Kanns deposited the actual securities properly endorsed with the voting trustee they then had a perfected secured lien thereon as pledgees. Therefore, the voting trustee, as agent of the Kanns, had the securities which were collateral for the debts, and it was the voting trustee's duty to eventually give to the Kanns whatever kind of a voting trust certificate was necessary in order to properly protect the Kanns in exchange for their delivery of endorsed securities which they held as pledgees. When the Kanns eventually did receive the unendorsed voting trust certificates, Decker had already died and the Kanns' position as pledgees with perfected secured liens had been already definitely established on the date of Decker's death. The mere fact that some time subsequent to Decker's death, upon the dissolution of the foreign attachment, the voting trustee delivered to the Kanns voting trust certificates in Decker's name and of necessity without his endorsement, does not affect the perfected secured pledgee status of the Kanns as between them and Decker at the time of the latter's death and thereafter.

Petitioners further contend that there were no liens at all, since under the 1937 Agreement (Exhibit "A", R. 36 a to 40 a) the Kanns had an option to repurchase

(Paragraph 9) (R. 38 a) and an obligation to repurchase in case of death (Paragraph 10) (R. 38 a), which option and obligation the Kanns breached.

Clearly, there can be no breach of an option to repurchase. An option in and of itself gives a choice, and the fact that the sellers elected not to exercise the option could in no way be construed as a breach of the Agreement.

As to the obligation to repurchase under Paragraph 10 of the 1937 Agreement (R. 38 a), petitioners fail to mention that before the obligation could be imposed, one of two things must have occurred:—(1) The death of the decedent “while in the employ of the company”, or (2) the death of the decedent “within thirty days after the termination of such employment” (R. 38 a).

The evidence does not show the date the decedent ceased to be an employee of Triumph Explosives, Inc. Petitioners' failure to supply any facts as to when decedent's employment ceased and, therefore, as to whether his death occurred while in the employ of the company or within thirty days after the termination of such employment, destroys the very basis for their claiming any default under Paragraph 10. One claiming a breach of contract has the burden of proving the facts constituting the breach. Quoting from the Opinion of the Pennsylvania Supreme Court (R. 99):

“The trouble with appellants' position in this regard is that the burden was upon them to prove that Decker did die within the period thus specified, but they offered no evidence for that purpose.”

Petitioners argue that under the 1941 Agreement the Kanns agreed to borrow the money to finance the

purchase and the borrower required the stock so purchased to be deposited as additional collateral (Petitioners' Brief, p. 16); further, that since the stock was not so deposited the Kanns had no right to retain the stock as collateral on the debt due them from Decker. (Petitioners' Brief, p. 16.)

The fact that the Kanns were entitled to retain the stock as security is not only clear upon a reading of the 1941 Agreement as an entirety, but it is conclusively confirmed by Decker's letter of October 31, 1942 (R. 48 a). This letter not only acknowledged the fact that Decker knew the Kanns were holding said stock as collateral security under the 1941 Agreement and acquiesced therein, but it also authorized the Kanns to deposit said stock with the voting trustee and to accept from such voting trustee, in place and stead of such stock, voting trust certificates, which the Kanns were to hold in lieu of the stock.

In view of the foregoing, the Kanns did not breach the 1937 Agreement, and also had a right to hold as collateral security the stock involved under the 1941 Agreement.

Therefore, the conclusion of the Supreme Court of Pennsylvania (R. 101)

"that the Kanns originally obtained, and never subsequently lost, the rights of pledgees of the stock received from Decker under the Agreements both of 1937 and 1941, and that those rights were continued in the voting trust certificates, the proceeds of the sale of which constitutes the present fund for distribution",

is unquestionably sustained by the facts in this case.

The pledgee of property, being entitled to retain the property until the conditions of the pledge are fulfilled,

certainly has a perfected secured lien on that property. The lien of a pledgee to whom the property has been transferred is as perfect as is the lien of a mortgagee whose mortgage has been recorded.

III.

The priority conferred upon debts of the United States under Revised Statutes 3466, Title 31, U.S.C.A. 191 was not intended to be superior to the rights of prior perfected secured lien holders.

The facts in this case disclose that respondents, the Kanns, had a valid perfected specific lien. The respondents insist that such a lien is not subordinated to, but is, in fact superior to the priority of the Government under Revised Statutes 3466, Title 31 U.S.C.A., Section 191. *United States v. Cutts*, 1 Sumner 133; Fed. Cas. No. 14192; Annotation to *New York v. McClay*, 288 U. S. 290 in 77 L. ed. 754, pp. 757 to 796.

Petitioners' contention is untenable that even though the Kanns have a perfected specific lien, nevertheless they do not have a priority of payment because of R. S. 3466 granting the United States a priority for debts due the United States. Were this contention of petitioners sustained by your Honorable Court, then not only individuals but every bank throughout the United States holding pledged collateral of individuals as security for their loans would lose their collateral security if the pledgor happened to die before repaying the loan and left an estate insufficient to pay the taxes owed the Government. Such a situation would disrupt the whole economic structure of this country whereby individuals

and concerns with good marketable collateral, by the pledging thereof, are now able to obtain loans.

Although we have not been able to find any decision of the United States Supreme Court determining whether the priority of the United States under R. S. 3466 was intended to be superior to the rights of valid perfected specific lien holders, the reason is that in all the cases reviewed by this Court it was found that the lien was not perfected and specific. However, in the recent case of *People of Illinois v. Campbell* decided December, 1946, 328 U.S. . . ., 91 L. ed. 272, at page 281, Mr. Justice Reed in his dissenting opinion says:

"As the Court concludes no specific lien attaches to ascertainable property, I content myself with adding, as to the respective priorities of the United States and a lienor with a specific lien on ascertainable property, that in my opinion such a lienor has priority for his lien despite Rev. Stat. Sec. 3466. See *Thehusson v. Smith*, 2 Wheat. (U.S.) 396, 424, 4 L. ed. 271, 278; *Conrad v. Atlantic Ins. Co.*, 1 Pet. (U.S.) 386, 441, 7 L. ed. 189, 213; *U. S. v. Waddill, Holland & Flinn*, 323 (U.S.) 353, 355, 89 L. ed. 294, 299, 65 S. Ct. 304."

It is to be noted that in the majority opinion in the case of *Illinois v. Campbell*, *supra*, the question of whether the priority of the United States is overcome by a fully perfected and specific lien was not decided for the reason that the Illinois lien was held to be not sufficiently specific or perfected to defeat the Government's priority.

In the instant case, the Kanns have a specific lien on ascertainable property.

Congress, in enacting R. S. 3466, could not have intended it to be construed so broadly as to confer a priority upon debts of the United States as against even prior perfected secured liens, or it would not have enacted Section 827. Section 827 (which we shall discuss under the heading V.) creates a lien of estate taxes which attaches only at decedent's death and fixes the lien of the estate tax at the time of decedent's death. Accordingly, if a *debt* of the United States (which an estate tax certainly becomes upon decedent's death) takes *priority* under R. S. 3466 against even *prior perfected liens*, then there is no need of making a lien of the estate tax, and Section 827 becomes useless legislation.

IV.

Revised Statutes 3466, Title 31 U.S.C.A. Sec.
191 must be construed with Section 3672 (b)
(1), Title 26 U.S.C.A.

Even if this Court were to hold that the priority of the Government under Revised Statutes 3466 is not overcome by a fully perfected and specific lien, still respondents respectfully contend that said section should be construed with Section 3672 Title 26, U.S.C.A.

Section 3672 (b) (1) provides that tax liens in favor of the United States shall not be valid with respect to a security as against any mortgagee, pledgee, or purchaser of such security for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge or purchase such mortgagee, pledgee or purchaser is without notice or knowledge of the existence of such lien.

Though the priority of payment accorded to the United States by Revised Statutes Section 3466 is not technically a "lien", it is analogous and tantamount thereto. *Marshall v. New York*, 254 U. S. 380, 385, 386.

Accordingly, the rights of a pledgee which accrue before the attaching of a Federal tax lien, there being no notice or knowledge thereof, are not affected by the Federal tax lien. *Meyer Estate*, 159 Pa. Sup. Ct. 296, 48 A 2d 210; *Manufacturers Trust Co. v. Sobel*, 26 N. Y. S. 2d 145; *United States v. Record Publishing Co.*, 60 Fed. Supp. 194.

V.

The lien of estate taxes under Section 827 Title 26 U.S.C.A. dates only from the time of decedent's death and does not take priority over pre-existing pledges the liens of which had attached during decedent's lifetime.

Attention is invited to the fact that the United States claimed priority only under R. S. 3466 (R. 15 a). In addition, the executors, in their Petition before the Orphans' Court of Allegheny Co., Pa., claimed priority for the United States Government only under the same section of the Revised Statutes (R. 63 a). On the basis of these claims, the auditing judge and the lower court *en banc* considered only said Section 3466 of the Revised Statutes. We do not see how petitioners, who are attempting to champion the Government's claim, can resort to a statute which was never relied upon by the Government in its initial claim presented to and decided by the Orphans' Court of Allegheny County, Pennsylvania.

Section 827, Title 26 U.S.C.A., though unimpaired by Section 3672 (b) (1) creates a lien of estate taxes which attaches only at decedent's death, since the gross estate is determined as of that date and the estate tax itself becomes an obligation of the estate at that time. *Detroit Bank v. United States*, 317 U. S. 329. Since Section 827 creates a general lien upon the decedent's gross estate only from the time of decedent's death, certainly prior pledges of property would not be defeated thereby. Otherwise, pledgees would have no security whatsoever in the event that the pledgor died prior to the time the debt was paid and before the pledge was redeemed. Section 827 does not establish such a priority, but on the contrary establishes only a lien upon the gross estate of the decedent. *Bowes v. United States*, 127 N. J. Eq. 132, 138, 11 A 2d 720, 723.

As stated by the Supreme Court of Pennsylvania (R. 111):

"Indeed it is impossible to believe that the statute could have intended that a bona fide mortgagee or pledgee should be obliged to surrender the mortgaged or pledged property if, though perhaps many years later, the mortgagor or purchaser happens to die leaving an estate insufficient to pay the estate tax; such an interpretation would be to render pledges and mortgages practically worthless as dependable securities."

The Opinion then follows with:

"It is of interest to note that in *United States v. Paul*, 41 F. Supp. 41, affirmed 127 Fed. Rep. 2d 64, which was the case affirmed by the United States Supreme Court sub nomine *Detroit Bank v. United States*, supra, it was held (see the Court's 8th conclusion of law, p. 47) that the lien of the United States for the Federal Estate taxes was inferior and subordinate to mortgages which had been placed by decedent upon his property prior to his death."

VI.

Conclusion.

Respondents contend that Section 237 (b) of the Judicial Code does not confer jurisdiction on this Court in the instant case because the title, right, privilege or immunity under the Statute of the United States herein involved is not personal to petitioners, but is that of the Federal Government under whom petitioners do not even claim.

If this Court does not agree with respondents' contention as to jurisdiction, then respondents urge that they have a perfected specific lien, which defeats the priority of the United States under Revised Statutes 3466; that Section 3672 (b) (1), Title 26 U.S.C.A. should be construed with Revised Statutes 3466, and that, therefore, the pledges here involved are protected against the priority of the United States as created by Revised Statutes 3466; and that Section 827, Title 26, U.S.C.A. only establishes an estate tax lien on the gross estate as of the date of decedent's death and creates no priority over pre-existing mortgages or pledges, the liens of which had attached during decedent's lifetime.

It is therefore, respectfully contended that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX.

REVISED STATUTES, Section 3466 (Section 191, Title 31, United States Code Annotated) provides:

"Priority established. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

SECTION 3670 (Title 26, United States Code Annotated) provides:

"Property subject to lien. If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

* * * * *

SECTION 3672 (Title 26, United States Code Annotated) provides:

"Validity against mortgagees, pledgees, purchasers, and judgment creditors.

* * * * *

(b) (1) *Exception in case of securities.* Even though notice of a lien provided in Section 3670 has been filed in the manner prescribed in subsection (a) of this section, or notice of a lien provided in section 3186 of the Revised Statutes, as amended, has been filed in the manner prescribed in such section or subsection (a) of this section, the lien shall not be valid with respect to a security, as defined in paragraph (2) of this subsection, as against any mortgagee, pledgee, or purchaser, of such security, for an adequate and full consideration in money or money's worth, if at the time of such mortgage, pledge, or purchase such mortgagee, pledgee, or purchaser is without notice or knowledge of the existence of such lien.

* * * * * * *

SECTION 827 (Title 26, United States Code Annotated) provides:

"Lien for tax.

(a) *Upon gross estate.* Unless the tax is sooner paid in full, it shall be a lien for ten years upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration, allowed by any court having jurisdiction thereof, shall be divested of such lien. If the Commissioner is satisfied that the tax liability of an estate has been fully discharged or provided for, he may, under regulations prescribed by him with the approval of the Secretary, issue his certificate, releasing any or all property of such estate from the lien herein imposed.

(b) *Liability of transferee, etc.* If the tax herein imposed is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession of the property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, who receives, or has on the date of the decedent's death, property included in the gross estate under section 811 (b), (c), (d), (e), (f), or (g), to the extent of the value, at the time of the decedent's death, of such property, shall be personally liable for such tax. Any part of such property sold by such spouse, transferee, trustee, surviving tenant, person in possession of property by reason of the exercise, nonexercise, or release of a power of appointment, or beneficiary, to a bona fide purchaser for an adequate and full consideration in money or money's worth shall be divested of the lien provided in section 827 (a) and a like lien shall then attach to all the property of such spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary, except any part sold to a bona fide purchaser for an adequate and full consideration in money or money's worth.

(c) *Continuance after discharge of executor.* The provisions of section 825 shall not operate as a release of any part of the gross estate from the lien for any deficiency that may thereafter be determined to be due, unless the title to such part of the gross estate has passed to a bona fide purchaser for value, in which case such part shall not be subject to a lien or to any claim or demand for any such deficiency, but the lien shall attach to the consideration received from such purchaser by the heirs, legatees, devisees, or distributees."

SECTION 237 (b) Judicial Code as amended by the Act of February 13, 1925, (United States Code Annotated Title 28, Section 344) provides:

It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.
